

**COMMENTS OF THE SECTION OF DISPUTE RESOLUTION  
OF THE AMERICAN BAR ASSOCIATION  
ON  
REPORT ON THE REASONABLE EXPECTATIONS OF  
CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE  
RESOLUTION ACT OF 1996  
(65 FEDERAL REGISTER 59, 200, OCTOBER 4, 2000)**

The Dispute Resolution Section of the American Bar Association is pleased to submit these comments on the Report on the Reasonable Expectations of Confidentiality under the Administrative Dispute Resolution Act of 1996 ("Confidentiality Report"). The views expressed herein are presented on behalf of the Dispute Resolution Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.<sup>1</sup>

The Section applauds the Federal ADR Council for beginning to address some of the difficult and important issues relating to maintaining appropriate confidentiality protections for parties in disputes handled by federal agencies under the Administrative Dispute Resolution Act of 1996 (the "ADRA"). The Confidentiality Report reflects considerable effort to explicate many of the Act's provisions. It provides thoughtful analysis and useful information that will benefit numerous federal and private participants and neutrals in these disputes. The Report's authors are to be commended for developing such a high-quality document, especially in such a short period.

Unfortunately, given the brief 30-day period that has been afforded to comment on the Report, the Section was unable to give this issue the review and analysis it deserves. This was unfortunate given the far-reaching impact the Guidelines are likely to have on the structure and conduct of Federal agency mediation and dispute resolution programs, as well as the future success of agency ADR initiatives. Protection of confidentiality is necessary to assure the success of ADR processes. Therefore, the Section urges the Federal ADR Council to issue the Guidelines in a manner that will permit future revision and reconsideration of the issues raised by the Guidelines.

The Section is concerned that any final Guidelines promulgated by the Federal ADR Council acknowledge the need for flexibility in ADR program design and give due regard to the varying needs of participants depending on the subject matter and context of the ADR proceeding. Confidentiality disclaimers may need to be tailored to reflect the formality of the ADR process being used, the sophistication of the participants, the availability of alternative fora for dispute resolution, and the presence or absence of counsel.

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<sup>1</sup> These comments are based on the existing policies of the American Bar Association, prior statements and activities of the Section, and consultations with senior officials of the Section.

A critical part of the Federal Government's success in utilizing ADR has been -- and will continue to be -- derived from allowing each agency and each regional office of agencies to grow their ADR programs in response to their particularized needs. Matching the forum to the fuss requires flexibility, especially in the early stages of program development. Therefore, we believe it is critical that the Federal ADR Council continue to encourage open discussion throughout this period of ADR program development. We believe that if the guidelines, as published in the Federal Register are republished as final, the vital development of ADR programs matching the particularized and varied needs of citizens and administrators throughout the country will be adversely affected.

The Section has urged interested members and other individuals and their respective organizations to submit comments on the Report. The Section also concurs with the comments filed by the ABA Section on Administrative Law and Regulatory Practice. In addition, we would point out that the ABA Sections of Dispute Resolution, Administrative Law & Regulatory Practice, and Public Contract Law last spring formed an Ad Hoc Committee on Federal ADR Confidentiality to work via a collaborative process and to develop by consensus guidance on relevant legal and practical issues.

The ABA's Ad Hoc Committee has sought explicitly to bring together knowledgeable representatives of many diverse public and private entities whose members are vitally affected by decisions on confidentiality in government ADR. This is a chief forum to build the foundation of trust so necessary for the success of decentralization in agency decision-making. We urgently request that the guidelines be published in such a way as to support this on-going dialogue.